The Supreme Court and Our Future

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If a century ago one had predicted the Supreme Court's next hundred years, one would doubt have gotten it wrong. Within five years of such a forecast, the Court would have held that segregation was consistent with the equal protection of the law; sixty-three years later, that it was not. Within six years, the Court would have begun the transformation of the 14th Amendment from a guarantee of equality to a guarantor of economic liberty; forty-six years later, on that front at least, it would have beaten a full retreat. Within some sixty years, it would have launched a different activist campaign, this time to protect the rights of some of the weakest in society, but as the century closes, that battle too has come to an end. At best, it was a century of cycles; at worst, it was confused.

Of a prediction of the next hundred years, there is little reason to expect anything more. At most we can speak about the very near future, a clue to which may be found in the very recent past. Consider just one case. It is the law that a criminal conviction obtained by general verdict cannot stand if one of the grounds upon which the conviction could have rested is unconstitutional or in some other way illegal. As the Supreme Court held in Yates v. United States in 1957, "a verdict [must] be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected."

In Griffin v. United States, decided this Term, the Court considered the types of insupportable grounds that are within the rule of Yates—specifically, whether the Yates rule covers a ground that is insupportable because the evidence it relied upon is insufficient as a matter of law. In an opinion written by Justice Scalia, the Court (without dissent) said that it did not. The Yates rule, the Court held, applied to "legal errors" only, and for these purposes, insufficiency of evidence is not "legal error." True, the Court said, in some cases the Court has held that insufficiency of evidence is legal error; indeed, it is constitutional error. But even if sometimes insufficiency of evidence is "legal error," sometimes it is not. In this case, not. As the Court viewed it, the difference was mere "semantics."

For what was important was what "what the petitioner seeks is an extension of Yates' holding... to a context in which we have never applied it before." Griffin is a criminal (or at least may be); with respect to criminals, the Constitution now protects only what it now protects; its protections will not be extended to something more.

Which is not to say that they will not be contract to something less. The recent past is littered with examples of the Court's willingness to change constitutional law when change means less protection for the currently disfavored, and more protection for the currently favored: Less protection for criminals, for the poor; more protection for states, for racial majorities, and for the police. For this is no less an activist Court than courts before—activist both in the sense that it constructs constitutional barriers to the decisions of democratic majorities (by resisting affirmative action and creating "states' rights"), and in the sense that it pursues its reconstructive task at an ever increasing rate.

Conservatives argue that such change is conservative because restorative, but restorative to what end? Even if the Constitution has been illicitly "amended" by past activist Courts, does anyone really believe that the public views this current restoration as a reaffirmation of original principles rather than as yet another illicit and political attempt by yet another president to "amend" the Constitution through judicial appointment? Will the result of this restoration be a public reawakened to the possibility of constitutional law, or a public increasingly cynical about constitutional politics? The Court calls itself conservative, but we have known conservatives. Justices Harlan and Frankfurter were conservatives. These justices are not. This Court, like the Court before it, like the Court before it, and like the Courts before it, has its own conception of a properly activist role, and with a certain unseemliness, is quite eagerly pursuing it.

The result will be a relatively more statist society, though statist in an oddly skewed sense. Government will have more power as individual rights are curtailed; but less power as majority rights (resisting affirmative action) and states' rights (resisting regulation by Congress) are expanded. (The one exception may be economic and property rights. There, individual rights may increase—a gain for some of those already possessed of the most power in society.) And barring calamity, this will be the pattern for at least the next two decades, for the conservatives have succeeded in lacing the court with youth—the average age of the last five appointees is fifty-three, the average retirement age over the century is seventy-two; the most recent addition, Justice Thomas, will just speed the reform.

Beyond substance, however, there is something particularly arresting about
the form of the Court’s most recent
turn, a change that should lead some
of us to ask whether we give the
Court more attention than is due. Few
doubt that the legal work-product of
the Court has declined, as less is done
by Frankfurters, or Jacksons, or
Stones, or Holmases, and more by
clers—our students, good students,
but students just two years out of law
school. Similarly, few doubt that the
political product of the Court has
increased, due again to who the Jus
tices are not, and to what they have
let their clerks become. Both trends
should suggest the intellectually barren
terrain that is the Court.

And yet the largest category of legal
scholarship continues to be directed to
the Court, reflecting on its work, its
method, and its mission. Why? For
what is most striking about this Court
is its complete disengagement from
anything else a reflective perspective
on its work. While the academy con-
tinues to grind out essay upon essay
struggling with the substance and
theory of much of the Supreme
Court’s job (over the past decade, for
example, there were some 1600
published articles discussing theories
of constitutional interpretation), there
is an inescapable sense that this is not
a perspective that the Court finds
either interesting or important, let
alone comprehensible. Instead of
advancing a theoretical debate to
advance the practice for which it is a
debate, we have engendered a theoreti-
cal debate for theory’s sake alone. The
rod has disengaged from the piston.

No doubt this is in part due to a
change in our own work-product as
much as to a change in the Court, as
academics flee the law for economics,
or philosophy, or literature, and as
more and more of our work appears
political, if only because it reveals the
premises that we no longer share. But
in part too it is due to an attitude of
the current judiciary that abjures
theory for approaches more pedes-
trian, that scorns the reflective to
embrace the reactive, that has given
up any sense that there is sense to be
made of the practice as a whole, or at
least that part which is the Court’s
practice.

My point is not about blame. It is
instead to ask how we should respond
to this current separation, whatever its
cause. When the academy and the
Court were closer, both in attitude
and in interest, we may well have been
right endlessly to engage questions of
constitutional theory or theories of
interpretation. These are, after all,
questions about a certain kind of
interpretive practice, and make sense
as questions so long as they remain
questions of that practice. But do
they make sense when at most their
answers play to an audience of none?
Do they make sense in a world where
most of what law routinely does it does
quite poorly, and where they address
not at all issues about what law rou-
tinely does? Is it possible that our
greatest contribution is no longer to
constitutional theory, but to ordinary
practice? To the questions raised and
yet unanswered by Zeisel and Kessler,
rather than Dworkin and Rawls?
Whatever the Court will become a
century from now, we know what it
will not be for the next generation.
It will not be the institution that
advances this nation’s, or law’s, ideals.
At best, it will wait for democrats to
do that; at worst it will lend aid to the
resistance. We should accept this and
move on to more fertile ground.